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No. 90-1947

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN K. YEE, *et al.*,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

ON WRIT OF CERTIORARI TO
THE FOURTH APPELLATE DISTRICT, DIVISION ONE,
COURT OF APPEAL FOR THE STATE OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF ARIZONA MOBILE HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

DOES A PHYSICAL TAKING RESULT FROM A STATUTORY SCHEME IN WHICH A LANDLORD CANNOT TERMINATE A TENANCY EXCEPT IN NARROWLY DEFINED INSTANCES OF "GOOD CAUSE"; IN WHICH THE LANDLORD, ABSENT "GOOD CAUSE" MUST RENEW RENTAL AGREEMENTS WITH TENANTS IN PERPETUITY; IN WHICH THE LANDLORD MUST PERMIT THE PURCHASER OF A MOBILE HOME ON HIS PROPERTY TO BECOME A TENANT WITH THESE SAME PRIVILEGES; IN WHICH A LANDLORD IS NOT FREE TO CHOOSE WHO WILL OCCUPY HIS PROPERTY WHEN A TENANCY ENDS DUE TO SALE BY A TENANT OF HIS MOBILE HOME; AND WHERE ULTIMATELY THE CHOICE OF WHO HIS FUTURE TENANTS WILL BE IS THAT OF HIS PRESENT TENANTS, NOT HIMSELF, REGARDLESS OF WHETHER OR NOT A RENT CONTROL SCHEME IS ALSO IN PLACE?

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INTEREST OF AMICUS CURIAE

This brief is submitted in support of the Petitioners herein.

The Arizona Mobile Housing Association, Inc. (AMHA) is a statewide organization of owners and managers of mobile home parks throughout Arizona. Arizona is in the same Federal Judicial Circuit as California.

The Arizona Mobile Home Parks Residential Landlord and Tenant Act was amended in 1987 to create a "perpetual lease" similar to the California Mobilehome Residency Law. The Arizona Act (Arizona Revised Statutes §33-1401, et seq.) since 1987, prevents a landlord from terminating or refusing to renew an existing tenant's rental agreement without "good cause," which is defined as violation of the rental agreement, nonpayment of rent, change in use of land, and repeated violations of landlord tenant laws. A.R.S. §33-1476(B). With respect to change in use of the land, the landlord must give affected tenants 180 days notice and must contribute the tenant's costs of relocating their mobile homes. A.R.S. §33-1476.01. If a tenant wishes to sell his mobile home on-site, the landlord must permit the purchaser to move in and become a tenant unless he has reasonable cause to disapprove the purchaser's tenancy. A.R.S. §33-1452(D)(3).

Contrary to California, the Arizona Act specifically prohibits local rent control, pre-empting that subject to the State. A.R.S. §33-1416(A). Arizona has not, to date, imposed any controls over the amounts which landlords may generally charge tenants as rent.

Thus, with respect to the instant case, Arizona law creates the "perpetual lease" much as California does, but does not yet have a system of mobile home space rent control in place.

The AMHA wishes to bring into focus the issue of whether State action creating a "perpetual lease" alone, without the existence of rent control, constitutes an unconstitutional taking of property without compensation.

SUMMARY OF ARGUMENT

A. The California Mobilehome Residency Law (Cal. Civ. Code 798 et seq.) limits a landlord's ability to terminate tenancies to narrowly defined instances of good cause, and obligates landlords to consent to assumptions of tenancies by purchasers of mobile homes on his property except in cases where he has narrowly defined reasonable grounds to withhold consent. The effect of these laws is that so long as the tenant does not give the landlord "good cause" to terminate the tenancy, he enjoys a "perpetual lease," giving him the right to permanently occupy the landlord's property, and giving him (not the landlord) to right to choose who will replace him once he decides to seil his mobile home and move.

B. The Escondido rent control ordinance creates similar restrictions for tenancies not covered by California statutes, and then imposes a system of rent control on all mobile home space tenancies.

C. The majority opinion of the Court below in *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, 274 Cal.Rptr. 551 (1990) assumed that the California statutes constituted a reasonable "regulation" of the landlord-tenant relationship and then upheld the validity of the Escondido ordinance on the ground that it constitutes legitimate rent control.

D. Two U.S. Courts of Appeal have reached contrary results faced with similar statutes and ordinances. They have held that by imposing restrictions similar to those created by California in effect creating a "perpetual lease," the government has gone beyond reasonable "regulation" and has accomplished a physical taking of the landlord's property. In both of those cases, as here, the situations involved laws both creating a "perpetual lease"

and imposing rent control. In both of them, as with the Courts below in this case, the rent control effects of the statutory scheme were relied on in part as supporting the decisions. *See, Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir., 1986); *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990).

E. All of these cases in turn, attempted to follow *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) and *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Loretto* held that the occupation of a landlord's property by a third party as a result of government action constitutes a physical taking. The Court stated that it did not intend to affect the State's powers to regulate landlord-tenant relationships, provided that those regulations do not subject the landlord to physical occupation of his property by a third party. *F.C.C.* held that *Loretto* does not apply when the landlord is not obligated to allow the third party to physically use his property. So long as the landlord has a legitimate choice whether or not to allow a tenant to use his property, government action regulating the rents he can charge that tenant do not constitute a physical taking.

F. The majority opinion below in *Yee* treated this as a rent control case, concluding that the rent control aspects of the Escondido ordinance were constitutional, and from that upheld the entire ordinance. Rent control, however, is not the issue in this case. The issue is whether or not the involuntary conversion of mobile home space rental agreements into "perpetual leases" constitutes a physical taking. The principles of *Loretto* and *F.C.C.* lead to a conclusion that regardless of whether

there is any rent control in the community or not, the provisions of the ordinance and of State law creating the perpetual lease constitute a physical taking. In determining that the physical taking has occurred, this Court does not even need to reach the rent control or economic issues.

G. A statutory scheme in which a landlord cannot terminate a tenancy except in narrowly defined instances of "good cause"; where the landlord, absent "good cause" must renew rental agreements with tenants in perpetuity; where the landlord must permit the purchaser of a mobile home on his property to become a tenant with these same privileges; where a landlord is not free to choose who will occupy his property when a tenancy ends due to sale by a tenant of his mobile home; and where ultimately, the choice of who his future tenants will be is that of his present tenants, not himself, is a physical taking regardless of whether or not there is a rent control scheme in place.

ARGUMENT

STATE ACTION IN CONVERTING MOBILE HOME TENANCIES INTO "PERPETUAL LEASES" CONSTITUTES A PHYSICAL TAKING OF THE LANDLORD'S PROPERTY EVEN IN THE ABSENCE OF RENT CONTROL.

The California Mobilehome Residency Law (Cal. Civ. Code 798 et seq.) prohibits the termination of tenancies of mobile home spaces except for certain narrowly defined good cause. Cal. Civ. Code §798.56. It also obligates the landlord to allow a purchaser of a mobile home to become a tenant unless the landlord has an objective and narrowly defined reasonable basis to disapprove. Cal. Civ. Code §§798.56(a) and 798.74. In effect, the

California statutes convert mobile home space rental agreements into "perpetual leases."

The California Court of Appeal, in sustaining the Escondido ordinance under review in the instant case, held in part that this sort of "regulation" of the landlord-tenant relationship did not constitute a taking. *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990).

It is the position of this brief that the California statutes go beyond "regulating" the landlord-tenant relationship. By converting space rental agreements into "perpetual leases," those statutes vest in tenants the right to permanently occupy the landlord's property and thus constitute a physical taking of his property by the State.

Although mentioning the restrictions in California law which result in the "perpetual lease," the essence of the decision in *Yee* upholding the Escondido ordinance was that the rent control aspects of the ordinance do not constitute a taking.

In *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir., 1986), the Court was faced with a Santa Barbara ordinance which accomplished two things:

1. It effectively duplicated State law insofar as termination of tenancies and transfer of tenancies was concerned; and

2. It imposed a scheme of rent control

Hall held that the Santa Barbara ordinance may constitute an unconstitutional taking.

The Escondido ordinance in the instant case does not explicitly duplicate State law as to termination and transfer of tenancies. It does, however, impose identical restrictions as to tenancies not covered by State law.

Both *Hall* and the Courts below in the instant case have failed to distinguish the "perpetual lease" from the rent control aspects of the local rent control ordinances. A careful analysis, however, discloses that the unconstitutional taking results from the conversion of these tenancies into "perpetual leases," not from the rent control provisions of the ordinances.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), found a physical taking where occupation is authorized by government without regard to the public interests that it may serve. The Court clarified, at footnote 9, that an invasion by a private party is treated no differently so long as that occupation is authorized by the State. It noted, however, that the holding was not intended to affect the State's powers to regulate landlord and tenant relationships, but went on to state:

> So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity.

Loretto, 458 U.S. at 441, 102 S.Ct. at 3179.

In *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), the Court found the *Loretto* rationale inapplicable to F.C.C. control over rates chargeable by pole owners to cable television services. The distinction was that in *F.C.C.*, nothing gave cable companies the right to use the poles, while in *Loretto,* the landlord was obligated to allow the private third party to physically use his property. This distinction was made clear in footnote 6, of the *F.C.C.* opinion where the Court stated:

> We do not decide today what the application of (*Loretto*) would be if the F.C.C. in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.

Both *Loretto* and *F.C.C.* involved elements of rent control. In *Loretto*, the government set the maximum rates which the landlord could charge the user of his property. In *F.C.C.*, the government set the rents which the pole owner could charge the cable company. Yet, the focus of both decisions was not on the charges permitted the landlord. The decisive factor in both was whether the landlord had the choice of whether to allow the third party occupation. In *Loretto*, the occupation was mandated by government action, and it was that which resulted in the physical taking. In *F.C.C.*, the landlord had the choice of whether to permit the occupation. Since the landlord could simply say "no" to the proposed tenant, no taking occurred. This consideration is entirely separate from what the landlord can charge the tenant; whether the taking occurs is a different issue from what the landlord can charge.

In *Hall*, the 9th Circuit applied these principles to the Santa Barbara ordinance. It found that a physical taking had occurred since the ordinance transferred a possessory interest in the landlord's land; that the interest constitutes a right to occupy the property in perpetuity; and that the interest was transferable by the tenant. *Hall*, 833 F.2d at 1276.

The *Hall* Court also based its determination on the fact that the ordinance allowed the tenant to pay only a fraction of what the right was worth, and found that the right acquired a significant market value resulting from rent control. It need not have reached these two economic considerations in finding a physical taking. *Loretto*

declares that once a physical occupation results from government action, a taking results without regard to whether the action "has only a minimal economic impact on the owner." *Loretto*, 458 U.S. at 436, 162 S.Ct. at 3175.

Under *Loretto*, the fact that the Santa Barbara ordinance conferred on the tenant a permanent, transferrable possessory interest in the landlord's land alone supported the *Hall* court's determination that a taking resulted. It was unnecessary to even consider the financial impact on both landlord and tenant of the rent control aspects of the ordinance.

A landlord suffers many forms of damage resulting from this sort of taking, quite apart from the economic harm resulting from rent control. He loses the right to exclude persons from occupying the land; he loses the right to occupy the land himself; he loses the power to control the use of the property; and he suffers a loss in the value of the land resulting from this. *Loretto*, 458 U.S. at 435-36; 102 S.Ct. at 3176.

The *Hall* court applied this analysis, and came close to concluding that the rent control features of the Santa Barbara ordinance did not result in the taking; that it was the creating of the "perpetual lease" which did:

> . . . the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

Hall, 833 F.2d at 1279.

There are many other aspects of the fee ownership which a landlord loses by reason of the "perpetual lease" laws completely independent of rent control. Some of these are identified in *Hall*, footnote 23.

Since 1987, Arizona mobile home park landlords have been operating under laws similar to the "perpetual lease" provisions of the Santa Barbara ordinance, with no rent control, and suffering these sorts of damages. It is as a result of their experiences that this brief has been filed.

Even in the absence of the rent control aspect of the Santa Barbara ordinance, *Hall*, applying the principles of *Loretto* and *F.C.C.* was correctly decided.

Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347 (3rd Cir. 1990) independently reached a similar result to *Hall* applying these principles. There, a State statute created the "perpetual lease" (similar to California), and a local ordinance imposed rent control. The 3rd Circuit found a physical taking since "(t)he combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently." *Pinewood*, 898 F.2d at 353.

An analysis of *Pinewood* shows that the Court focused on the "perpetual lease" statute, not the rent control ordinance, in finding the physical taking. Although the Court dwelled at length on the inequities of the rent control ordinance resulting in windfalls to tenants reselling their mobile homes, the decision turned on the "perpetual lease" statute:

> We acknowledge, of course, that appellants may receive a constitutionally adequate rent for the occupancy of the tenants as such, but that fact is not material to our analysis for, according to the complaint, they receive nothing at all for the taking of the alienable physical property interest vested in their tenants.

Pinewood, 898 F.2d at 353; c.f., footnotes 10 and 11.

The *Pinewood* court itself distinguished this situation from a normal rent control case:

> First, in urban apartment rent control it is the landlord who chooses, selects and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity.

Pinewood, 898 F.2d at 356.

In the instant case, the Escondido ordinance does not reproduce the State "perpetual lease" statutes as the Santa Barbara ordinance did in *Hall*. It clearly incorporates them, however, and separately creates a "perpetual lease" for tenancies not covered by the State statutes (*see* section 6 of the Escondido ordinance). The reasoning of *Hall* and *Pinewood* applies to the Escondido ordinance no differently than it did to the laws at issue in those cases.

The right to occupy property in perpetuity is protected by the taking clause. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Loretto, supra.* Even when the result of governmental expropriation is the transfer of private property to private parties, a taking has occurred. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); *Loretto, supra.*

In the instant case, it is not the rent control provisions of the ordinance by themselves which result in the taking. It is the "perpetual lease" statutes. The grossly inequitable results of the rent control provisions which flow

from their application to the tenants' "perpetual lease" merely illustrate in graphic terms the severe injustice to which a landlord may be subjected by the State's transfer of those rights to the tenants.

The California Mobilehome Residency Law transforms mobile home space rental agreements into "perpetual leases." It eliminates the right of a landlord to refuse to renewal rental agreements absent statutorily defined good cause; it gives the tenant (and his successors in interest) the right to choose who will replace him as an occupier of the property; and it deprives the landlord of the right to simply cause the space to become vacant upon expiration of a rental agreement or when the tenant moves out. This was duplicated by the rent control ordinance in *Hall,* and is partially duplicated in the Escondido rent control ordinance in the instant case.

This State action deprives the landlord of his right to exclude others not of his choosing from his land; it deprives him of the right to make non-possessory use of his property; it deprives him of the right to simply let his property sit vacant; and it seriously erodes the value of his property since any purchaser will take it subject to these same disabilities. In the words of the *Hall* court at footnote 23:

> To the extent these choices are narrowed or eliminated altogether, the burden on the landlord is increased and his essential attributes of ownership are eroded until they become illusory.

This State action constitutes a taking under the principles of *Loretto* and *F.C.C.* even without taking into account the severe impact of the rent control features of these ordinances. In fact, absent the State statutes and their counterparts in the local ordinances, it is unlikely

that any attack on the validity of the Escondido or Santa Barbara rent control programs would have been mounted in the first place.

CONCLUSION

This is not a rent control case. It can and should be decided without regard to the rent control features of the Escondido ordinance.

The effect of the California statutes and their counterparts in the Escondido ordinance creating the "perpetual lease" constitutes a taking under the principles of *Loretto* and *F.C.C.*

Respectfully submitted,

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